Supreme Court, U.S.

(1)

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No. OFFICE OF THE CLERK

Supreme Court of the United States

Term October 2002

Sean M. Mulcahey, petitioner

v.

Euro General Contractors, a Washington corporation, and Ludvik Stribney, respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SEAN M. MULCAHEY, PETITIONER, PRO SE
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Petitioner, Pro Se

18 pp

I. Questions Presented For Review

Did petitioner and a witness set forth specific facts that prohibit a summary judgment when they testify from direct personal knowledge of a pay scheme that results in pay for overtime hours at straight time rate instead of time and half rate required by Fair Labor Standards Act (FLSA), 29 U.S.C. §207, in declarations certified under penalty of perjury aas provided by 28 U.S.C. §1746?

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IV. Decision Below

The memorandum below is reported at 37 F. Appx. 943.

V. Statement of Grounds For Jurisdiction of this Court

The memorandum below was filed by the court of appeals on June 20, 2002. The Order denying petition for rehearing was entered on August 1, 2002. This Petition for Writ of Certiorari is presented within 90 days of the memorandum below. This Court has jurisdiction to review this decision provided by 28 U.S.C. §1254(1).

VI. Law Involved in this Case

28 U.S.C. §1746

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or

proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

VII. Statement of the Case

On September 29, 1999 Sean Mulcahey filed the Complaint against Euro General Contractors and Ludvik Stribney (EGC), W.D. Wash. No. C99-5506RJB.

On May 8, 2000, the district court entered its Order Granting Motion for Partial Summary Judgment dismissing the part of the petitioner's claim for wages earned prior to the three year statute of limitations. App. pp. 31-35.

On May 11, 2000 Sean Mulcahey filed a Plaintiff's Motion for Partial Summary Judgment finding that he worked 41 hours of overtime.

On May 30, 2000 EGC filed a Counter-Motion for Full Summary Judgment on All Issues as part of their Responding Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment.

On June 21, 2000 Sean Mulcahey filed a Plaintiff's Cross Motion for Summary Judgment on Remaining Issues.

On June 28, 2000 the district court entered its Order Re Summary Judgment Motions denying Sean Mulcahey's Cross Motion on Remaining Issues, granting most of EGC's Motion for Summary Judgment, and awarded Sean Mulcahey $649.02 for unpaid overtime wages for 43 hours of unpaid overtime admitted by appellees. It left Sean Mulcahey's claim for travel time and attendance of safety meetings to be decided later. App. 20-30.

On July 3, 2000 Sean Mulcahey filed a Plaintiff's Motion for Reconsideration of Order Re Summary Judgment Motions.

On July 11, 2000 Sean Mulcahey filed a Plaintiff's Second Motion for Summary Judgment.

On July 13, 2000, the district court entered its Order Denying Motion for Reconsideration. App. 18-19.

On July 13, 2000 Sean Mulcahey filed a Plaintiff's Motion for Summary Judgment Awarding Liquidated Damages Under Federal Law.

On August 8, 2000 the district court entered its Order Denying Motions. This Order denied Sean

Mulcahey's Second Motion for Summary Judgment and his Motion for Liquidated Damages. App. 16-17.

On August 28, 2000, the parties filed a Stipulation to Dismiss the Remaining Claims and the district court entered the Order. App. 14-15.

On October 19, 2000 Sean Mulcahey filed a Plaintiff's Motion for Costs and Reasonable Attorney's Fee and for Entry of Judgment.

On November 20, 2000, the district court entered its Order Granting in Part Plaintiff's Motion for Costs and Attorney's Fee. App. 5-13

On November 21, 2000 the district court entered the Judgment.

On November 22, 2000 Sean Mulcahey appealed to the Ninth Circuit Court of Appeals, No. 00-36039. The court of appeals had jurisdiction under 28. U.S.C. §1291.

On June 20, 2002, the court of appeals filed the Memorandum affirming the district court's decision. App. pp. 2-4.

On July 8, 2002, Mr. Mulcahey filed his petition for rehearing en banc and the court of appeals ordered the late petition for rehearing filed.

On August 1, 2002, the court of appeals denied the petition for rehearing. App. p. 1.

VIII. Argument for Allowance of the Writ

In the Memorandum entered on June 20,

2002, the court of appeals found:

> We agree with the district court that Mulcahey did not support these claims with probative evidence showing that there was a genuine issue of material fact for trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("[T]he plaintiff could not rest on his allegations . . . to get to a jury without significant probative evidence tending to support the complaint").

App. p. 4. The problem with this conclusion is that Mr. Mulcahey submitted declarations by himself and by another former Euro General Contractors employee, James Cross, that testify, from direct personal knowledge and not from hearsay, that the number of hours they reported were arbitrarily reduced in half, the pay rate doubled, so as to allow the employer to pay for overtime hours at the straight time rate. This is not a "conclusory allegation", it is a specific fact to which ,Mr. Mulcahey and Mr. Cross declare under penalty of perjury. This material fact was overlooked in the Memorandum. The Memorandum is in conflict with *Reeves v. Sanderson Plumbing Prod., Inc.*, (2000) 530 U.S. 133, 150-151, 147 L. Ed. 2d. 105, 120 S. Ct. 2097; *Anderson v. Liberty Lobby, Inc.*, (1986) 477 U.S. 242, 249, 91 L. Ed. 2d. 202, 106 S. Ct. 2505; *Celotex Corp. v. Catrett*, (1985) 477 U.S. 317, 322-323, 91 L. Ed. 2d. 265, 106 S. Ct. 2548; *and Adickes v. S.H. Kress & Co.*, (1970) 398 U.S. 144, 158-159,

26 L. Ed. 2d. 142, 90 S. Ct. 1598. Two examples of this evidence:

Declaration of Sean Mulcahey:

5. The hours that we worked at the company are correct, except for the fact that they are cut in half; if we worked eight hours our boss would report four hours. Although I did not understand it at the time, I now know this was to eliminate the need to report overtime hours to Labor and Industries, as well as for the defendants' personal gains.

6. That is the crux of this case, all our time has been halved.

7. Specifically, I object to the defendants saying I did not work the hour stated on the timecards. I did work the declared hours, and many more hours that were not declared. The reason they were not declared in because I had been told by the defendants to do otherwise.

The Declaration of James Cross, reads in significant part:

5. Sean has said that that the checks were always issued with one half of the real hours. I would also concur that is the case, if we worked forty hours it would show up as twenty hour on our check, in other words half the hours would be unpaid.

6. I saw Mr. Stribrny reject any overtime hours and have the timecards re-written to

reflect no overtime.

Employees have personal knowledge of what hours they work and they have personal knowledge of when some of these hours are not paid and of the accounting tricks used to avoid paying them for some of these hours or to avoid paying the time and half premium required by 29 U.S.C. §207. Failure to pay any money at all for an hour of work violates the minimum wage required by 29 U.S.C. §206 because zero is less than the minimum wage.

If personal knowledge testimony by employees as to what hours they worked and how they were paid for those hours and of the accounting tricks used to deny them pay for all of their hours at the agreed wage rate, and at one and one half times the regular hourly rate for the overtime hours, does not set forth specific facts that prohibit a summary judgment dismissal of their Fair Labor Standards Act claims, then the federal wage and hour law is an orphan statute that is unenforceable. This Court found:

> "Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive."

Negonsott v. Samuels, (1993) 507 U.S. 99, 104, 122 L. Ed. 2d. 457, 113 S. Ct. 1119, (internal quotation marks omitted) quoting *Griffin v. Oceanic Contractors, Inc.*, (1982) 458 U.S. 564, 570, 73 L.

Ed. 2d. 973, 102 S. Ct. 3245. *Griffin* in turn quoted *Consumer Product Safety Commission v. GTE Sylvania*, (1980) 447 U.S. 102, 108, 64 L. Ed. 2d. 766, 100 S. Ct. 2051.

To give effect to the will of Congress as expressed in 29 U.S.C. §207, the direct personal knowledge testimony of the employee as to the hours he worked, how he was paid and the accounting tricks used to avoid paying him time and a half for his overtime must be admissible, 28 U.S.C. §1746, and it must be deemed to create a genuine issue of material fact when contradicted by the employer that defeats a summary judgment motion to dismiss.

IX. Conclusion

For the reasons stated herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEAN M. MULCAHEY, Plaintiff-Appellant,	)	No. 00-36039
v.	)	D.C.#CV-99-05506-RJB
EURO GEN. CONTRACTORS, a corporation registered under the laws of the State of Washington, LUDVIK STRIBNEY, Defendant-Appellee.	)	ORDER

Before: BROWNING, B. FLETCHER, and GOULD, Circuit Judges.

Judge Gould has voted to deny the Petition for Rehearing En Banc, and Judges Browning and B. Fletcher have recommended the same.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is DENIED.

Note: The stamp on this Order reads:

FILED
AUG 01 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEAN M. MULCAHEY,)
Plaintiff-Appellant,) No. 00-36039
v.) D.C.#CV-99-05506-RJB
EURO GEN. CONTRACTORS,)
a corporation registered under) MEMORANDUM[1]
the laws of the State of)
Washington, LUDVIK)
STRIBNEY,)
Defendant-Appellee.)

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding
Argued and Submitted June 12, 2002
Seattle, Washington

Before: BROWNING, B. FLETCHER, and
GOULD,Circuit Judges.

Sean M. Mulcahey filed a complaint under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *etseq.*, and Washington state law, Rev. Code

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as may be provided by Ninth Circuit Rule 36-3.

Wash. §49.46, seeking unpaid overtime compensation from his former employer, Euro General Contractors ("Euro"), for the period between 1992 and 1999. Mulcahey appeals the district court's summary judgment orders that: (1) limited his claims pursuant to the statute of limitations; and (2) dismissed the bulk of his claims for overtime compensation. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

At the threshold, we reject Euro's argument that Mulcahey's appeal should be dismissed as untimely under Fed. R. App. P. 4(a)(1)(A). The rule is clearly established that the time for appeal does not begin to run "until a judgment is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure, that is, until [the judgment] is set forth in a separate document and properly entered by the clerk of the court." *McCalden v. Cal. Library Ass 'n,* 955 F.2d 1214, 1218 (9th Cir. 1990). *See also Venon v. Heckler,* 811 F.2d 1274, 1276 (9th Cir. 1987) ("Absent compliance with [Rules 58 and 79(a)] a party will not ordinarily be found to have exceeded any of the time periods set forth in Fed. R. App. P. 4(a)"). Here, the district court did not enter a formal judgment on a separate document until November 21, 2000, and the time for appeal did not begin to run until then. Because Mulcahey filed his Notice of Appeal one day later, his appeal was timely under Fed. R. App. P. 4(a)(1)(A).

We reject Mulcahey's contentions that: (1) he was entitled to more than the forty-three hours of overtime compensation to which the defendants conceded; and (2) that overtime compensation was wilfully withheld. We agree with the district court that Mulcahey did not support these claims with probative evidence showing that there was a genuine issue of material fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("[T]he plaintiff could not rest on his allegations.., to get to a jury without any significant probative evidence tending to support the complaint"). The district court correctly granted summary judgment to Euro on these claims.

Because we find Mulcahey's claim that he is entitled to additional overtime pay for work performed during the years 1992-1999 to be without merit, we need not address the statute of limitations question.

AFFIRMED.

Note: The stamp on this Memorandum reads:

FILED
JUN 20 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SEAN M. MULCAHEY,)
Plaintiff,) No. C99-5506RJB
v.)
EURO GEN. CONTRACTORS,) ORDER
a corporation registered under) GRANTING IN
the laws of the State of) PART PLAINTIFF'S
Washington, LUDVIK) MOTION FOR COSTS
STRIBNEY,) AND ATTORNEY'S
Defendant.) FEE

This matter comes before the court on Plaintiffs Motion for Costs and Reasonable Attorney's Fee and for Entry of Judgment (Dkt. #91). The court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

I. PROCEDURAL HISTORY

On September 29, 1999, plaintiff filed a complaint for overtime compensation under the Fair Labor Standards Act (FLSA) for the years 1992 through 1999. Dkt. #1. On October 27. 1999, defendants sent a letter to plaintiff, offering to provide full "lay down" discovery and suggesting the case might be a candidate for alternative dispute resolution. Dkt. #5. On November 5, 1999, defendants provided plaintiff with every document

it had regarding Sean Mulcahey. Dkt. #95, Exh. 2. On November 16, 1999, defendants offered to take judgment against them in the amount of $1500, pursuant to Fed.RCiv.P. 68. Dkt #95, Exh. 1.

The parties filed a joint status report on December 10, 2000, and then met for mediation on I)eeember 14, 1999, but the matter did not settle. Dkt. #8 and 10.

Defendants filed a motion to compel discovery which the court granted on February 25, 2000. Dkt. #18. Plaintiff filed a motion to compel discovery which was denied March 17, 2000, and the court suggested that if the case was relatively small, the parties should immediately mediate. Dkt. #26. Defendants proposed immediate mediation. Dkt. #95, Exh. 6 and 7 At least as early as March 13, 2000, defendants admitted liability for 41 hours of overtime. Dkt. #22 and 92. at 2.

On May 8, 2000, before the second mediation occurred, the court granted defendants' motion for summary judgment, limiting plaintiffs claims to those within the three-year statute of limitations. Dkt. #38. Three days later, plaintiff moved for summary judgment regarding 41 hours of overtime as well as time spent attending safety meetings. Dkt. #41. In their response, defendants admitted that plaintiff was entitled to 43 hours of overtime during the relevant period and that the dollar value of these hours totaled $649.06. Dkt. #45. Defendants moved for summary judgment on all other issues. *Id.*

A second mediation was held June 9, 2000, but was again unsuccessful.

On June 28, 2000, the court granted summary judgment in favor of plaintiff in the amount of $649.02, and granted summary judgment on the remaining issues for defendants, with the exception of claims related to safety meetings. Dkt. #68. On August 28, 2000, the parties stipulated to dismissal of the remaining claims. Dkt. #90.

Plaintiff's counsel Paul King requests costs of $570 and $6231.75 in attorney's fees. Dkt. #91. He states that he has excluded all the costs and fees incurred after the court issued its order on June 28, 2000 granting summary judgment for plaintiff for $649.02.

Defendants object to an award of any fees or costs for Mr. King's services, with the exception of the $150 filing fee.

In his reply, plaintiff requests at least his attorney's fee award for $1207.50 for work that incurred prior to the offer of judgment. Plaintiff also argues that he is asking for far less than the total attorney fee and cost bill of $32,348.47.

II. STANDARD FOR AWARDING ATTORNEY FEES AND COSTS IN FLSA CASE

The Fair Labor Standard Act directs that the court shall allow a reasonable attorney's fee and costs to a prevailing plaintiff 29 U.S.C. § 216(b).

III. DISCUSSION

A. Attorneys Fees

Plaintiff prevailed on his claims for uncompensated overtime of $649 02. Although defendants argue plaintiff waived his claim for attorney's fees when he failed to preserve this issue in the stipulated order of dismissal (Dkt. #90), it is not proper to deny the request for attorney's fees on that basis. The court had already granted summary judgment in plaintiffs favor for $649 02, and the stipulated order of dismissal did not explicitly waive attorney's fees

In reviewing a claim for attorney's fees, the court considers the following: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, *(5)* the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9)the experience, reputation, and ability of the attomeys, (10) the undesirability' of the case, (Il) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Kerr* v *Screen Extras Guild, Inc.,* 526 F2d 67, 69-70(9th Cir. *1975), cert denied,* 425 U.S. 951 (1976). These considerations are consistent with RPC *1.5.*

In reviewing a claim for attorney's fees under FLSA, the court determines what fee is reasonable given the circumstances. *Haworth v State of*

Nevada, 56 F.3d 1048, 1052 (9th Cu. 1995). The district court must take into consideration the amount of the Rule 68 offer, the stage of the litigation at which the offer was made, what services were rendered thereafter, the amount obtained by the judgment, and whether it was reasonable to continue litigating the case after the Rule 68 offer was made. *Id.* at 1052-53.

Time and Labor: Plaintiff's claims for overtime earned earlier than September 29, 1996, were barred by the statute of limitations, yet Mr. King pursued claims that he should have known were barred by the statute of limitations. The viable claims amounted to $649.02. Mr. King apparently did not pursue his client's compensable claims by drafting a demand letter or filing in small claims court. Nonetheless, he did have a basis for pursuing overtime compensation in federal court dating back to September 29, 1996. The amount of those claims was small. Defendants claimed throughout the proceedings that a small amount of money was involved and that the case should be resolved through negotiation and settlement. Dkt. #10, 22,26, and *95.* On November 16, 1999, a month and a half after plaintiff filed suit, defendants made an offer pursuant to Fed.R.Civ.P. 68 to take judgment for *$1500,* more than twice the amount plaintiff eventually received pursuant to the court's summary judgment order. At that point, defendants had provided all of the documents they had relating to

plaintiff's employment. Defendants continued to urge mediation to resolve the issues. In sum, it was not reasonable for plaintiff to pursue litigation after the Rule 68 settlement offer was made, when such a small amount of money was at issue, defendants had provided "lay down" discovery, and defendants consistently showed their willingness to resolve the issues without needless, protracted, and expensive litigation.

Mr. King's actions needlessly complicated this case when he failed to respond to discovery requests (Dkt. #18), involved the court in discovery matters in violation of discovery rules and a court order (Dkt. #26), and filed an untimely second motion for summary judgment (Dkt. #70 and 87). Defendants undoubtedly incurred costs in time and money responding to litigation tactics that were unnecessary and generally without merit.

ln his reply, Mr. King states that, even if the court were to bar fees that were incurred after the Rule 68 offer. he should be awarded $1207.50, to reflect the time he spent on the case prior to that offer. Defendants claim that it appears that plaintiffs office staff members actually performed most of that work. Mr. King apparently does not dispute that some of the services were performed by his office staff, but states that is why is requests only $125 per hour in compensation, which appears to be the rate he charges for work performed by other persons in his office. *See* Dkt. #92, billing record. It appears he

claims to have spent 9.66 hours on the case prior to the Rule 68 offer. While that amount in itself is not unreasonable, the court must review the amount of time spent in light on the small amount of money at issue in this case. Mr. King look a significant step in filing this ease in federal court, and he should have known at the beginning that a small amount of money was involved. He certainly should have recognized that a significant portion of plaintiffs claims was barred by the statute of limitations. It appears likely that the same results could have been obtained by an exchange of correspondence and records. A reasonable amount of attorney's fees in this case should be no more than 1/3 of the amount plaintiff ultimately received on the viable claims.

Novelty of the case. This case involved a routine matter of overtime compensation.

Skill requisite. As stated above, Mr. King could have written a demand letter, should have known that many of the claims were barred by the statute of limitations, and could have pursued the claims in small claims court or resolved them early on in this litigation. The skill required to secure the overtime compensation due was minimal.

Preclusion of employment elsewhere, fixed or contingent fee lime limitations, length of relationship, and similar awards Mr. King has provided the court with no information to assess these factors.

Customary fee. Mr. King claims an hourly

rate of $125. This amount is not unreasonable, but must be evaluated in light of the ultimate result in this case.

Amount involved and results. The value of the viable claims in this case was small

Experience, reputation. Defendants cited to *Apostolis v. Seattle,* 101 Wn.App. 300 (May 2000), a case in which Mr. King represented a plaintiff whose claims were dismissed in part as a sanction for acting in willful and deliberate disregard of court orders. The court is reluctant to give much weight to such events in another case. Clearly, however, Mr. King has presented no information that would justify a premium for experience or reputation.

Undesirability of case. This case was neither desirable nor undesirable.

In sum, plaintiff should be awarded $218 75 in attorney's fees for this ease.

Plaintiff requests $570 for costs related to this litigation. Plaintiffs are not entitled to any costs they incurred after a Rule 68 offer of judgment is made. *Haworth v. State of Nevada, 56* F.3d at 1053 Plaintiff incurred $38.25 in costs prior to November 16, 1999, the date of the Rule 68 offer. *See* Dkt. #92, billing records. The court should award these costs to plaintiff in addition to the $150 filing fee, which fee the defendants do not contest.

Therefore, it is hereby

ORDERED that Plaintiff's Motion for Costs

and Reasonable Attorney's Fee and for Entry of Judgment (Dkt. #91) is **GRANTED IN PART. Plaintiff** is awarded $218.75 in attorney's fees, and $188.25 in costs.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 20th day of November, 2000

/s/
ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SEAN M. MULCAHEY,) No. C99-5506RJB
Plaintiff,)
v.) STIPULATION TO
EURO GEN. CONTRACTORS,) DISMISS THE
a corporation registered under) REMAINING
the laws of the State of) CLAIMS WITH PRE-
Washington, LUDVIK) JUDICE, FRCP41(a)(1),
STRIBNEY,) AND ORDER DISMISSING THE
Defendant.) REMAINING CLAIMS

COMES now the partie, through their undersigned attorneys, to stipulate for dismissal with prejudice the remaining claims in this action that survived summary judgment signed on June 28th, 2000, Dkt. #68. This stipulation is pursuant to FRCP 41(a)(1).

Respectfully submitted, August 23, 2000.

/s/
Paul H. King, WSBA #7370
Attorney for plaintiff

/s/
Thomas R. Dreiling, WSBA #4794
Attorney for defendant

Based upon the foregoing stipulation, it is hereby ORDERED:

The remaining claims in this action that survived summary judgment signed ~~on June 18th~~, 2000, Dkt. #68, are dismissed with prejudice.

DONE IN OPEN COURT THIS 28th day of Aug 2000.

/s/
ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SEAN M. MULCAHEY, Plaintiff, v. EURO GEN. CONTRACTORS, a corporation registered under the laws of the State of Washington, LUDVIK STRIBNEY, Defendant.	) No. C99-5506RJB	ORDER DENYING MOTIONS

THIS MATTER comes before the court on the following motions filed by plaintiff: Plaintiff's Second Motion for Summary Judgment, filed 11 July 2000 (Dkt. #70); Plaintiff's Second Motion for Summary Judgment, Corrected, filed 11 July 2000 (Dkt. #74); and Plaintiff's Motion for Summary Judgment Awarding Liquidated Damages Under Federal Law, filed 13 July 2000 (Dkt. #78). The court is familiar with the records and files herein, and documents filed in support of and in opposition to these motions.

The court's trial notice, issued on 15 December 1999, set the dispositive motion filing deadline for 8 June 2000. These motions are not timely. Furthermore, based on defendants' response, there are at least issues of fact that preclude

plaintiff's motions.

The court is aware of defendants' suggestion for sanctions, and declines at this time to award sanctions, provided, however, that the decision not to award sanctions at this time is without prejudice to further consideration of sanctions following the pretrial conference. What issues, if any, remain will be determined at the pretrial conference.

Therefore, it is now

ORDERED that Plaintiff's Second Motion for Summary Judgment, Plaintiff's Second Motion for Summary Judgment, Corrected, and Plaintiffs Motion for Summary Judgment Awarding Liquidated Damages Under Federal Law are all hereby DENIED.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

DATED this 8th day of August, 2000

/s/
ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SEAN M. MULCAHEY, Plaintiff, v. EURO GEN. CONTRACTORS, a corporation registered under the laws of the State of Washington, LUDVIK STRIBNEY, Defendant.	) No. C99-5506RJB) ORDER DENYING MOTION FOR RECONSIDERATION	

This matter comes before the court on Plaintiff's Motion for Reconsideration of Order Re Summary Judgment Motions (Dkt. #69). The court has considered the pleadings filed in support of the motion and the file herein.

W. D. Wash. Local Rule CR 7(e)(3) provides that the opposing party not file a response unless requested by the court. No response has been requested.

The plaintiff seeks reconsideration of the courts Order RE Summary Judgment Motions, entered on June 28,2000. Dkt. #68. The plaintiff argues that the court failed to consider the plaintiff's claim for liquidated damages under federal law.

A motion for reconsideration should be denied unless there is showing of manifest error in

the prior ruling or a showing of new facts or legal authority which could not have been brought to [the court's] attention earlier with reasonable diligence." W. D. Wash. Local Rule CR 7(e)(l).

The court has reviewed each of the plaintiffs memoranda regarding the summary judgment motions addressed in the court's order of June 28, 2000. Dkt. ## 40,41, *56,* and 63. No where in any of those memoranda was the issue of liquidated damages under federal law raised. Unless an issue is specifically raised, the court will not address it. The issue of liquidated damages under state law was raised in the defendant's motion in docket no. 45 at page 3. As a result, the court ruled on that issue at pages 6 - 7 of the order. The plaintiff's motion for reconsideration should be denied.

Therefore, it is hereby

ORDERED that Plaintiffs Motion for Reconsideration of Order Re Summary Judgment Motions (Dkt. #69) is **DENIED**.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing **pro se** at said party's last known address.

DATED this 13th day of July, 2000

/s/
ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SEAN M. MULCAHEY, Plaintiff, v. EURO GEN. CONTRACTORS, a corporation registered under the laws of the State of Washington, LUDVIK STRIBNEY, Defendant.	) No. C99-5506RJB)) ORDER RE SUMMARY JUDGMENT MOTIONS	

This matter comes before the court on *Plaintiff's Motion for Partial Summary Judgment* (Dkt. #40), Defendants' Cross Motion for Full Summary Judgment on All Issues (Dkt. *#45),* and Plaintiff's Cross Motion for Summary Judgment on Remaining Issues (Dkt. #63). The court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

SUMMARY JUDGMENT STANDARD

The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp.* v. *Catrett,* 477 U.S. 317,323(1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the

non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475* U.S. 574, *586* (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P.56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, inc.,* 477 U.S. 242,253 (1986); *T. W. Elec. Service Inc. v. Pacific Electrical Contractors Association,* 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial -- e.g., the preponderance of the evidence in most civil cases. *Anderson,* 477 U.S. at 2554; *T. W. Elec. Service inc.,* 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T W. Elec. Service,* 809 F.2d at 630 (relying on *Anderson, supra).* Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan*

v. National Wildlife Federation, 497 U.S. 871, 888-89 (1990).

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Sean Mulcahey, worked for the defendants doing siding work on new home construction. In this lawsuit, he claims that he was denied overtime compensation from September 29, 1996 until his termination from employment on August 31, 1999. From September 29, 1996 until December 1998, the plaintiff was paid on an hourly basis. From December 1998 until August 31, 1999, when the plaintiff terminated his employment, he was paid on a piece (per house) basis.

The defendants' employees were paid as follows: A lead man was assigned a house for siding and assigned a crew of employees to assist him. The lead man was given a budget based on the square foot siding required for each house. The lead man would pay his crew according to the hours worked by each individual crew member, and any left over money was kept by the lead. Time cards were completed by the lead man for each crew member. The lead man was also required to complete time cards for his time, and if the lead man worked in excess of 40 hours in a week, he would be paid overtime according to an agreed hourly wage.

From September 29, 1996 until December 1998, the plaintiff was a member of the crew led by his father, Michael Mulcahey. Mr. Mulcahey states

that the plaintiff never worked in excess of 8 hours in any given day. In December 1998, the plaintiff became a lead man, and the basis for his pay was on the piece method described above.

I. Plaintiff's Motion for Partial Summary Judgment.

In his Motion for Partial Summary Judgment, the plaintiff claims that he is entitled to 41 hours of overtime, liquidated damages equal to the amount of41 hours of overtime compensation, as well as costs and attorney fees.

In response, the defendants examined the time cards submitted by the plaintiff and calculated that, in 1999, he was entitled to 43 hours of overtime compensation, in the amount of $649.06. Although the defendants vigorously deny that they wilfully withheld that compensation, they agree that, when the numbers are added, the time cards reflect 43 hours of overtime. As a result, the plaintiff's Motion for Partial Summary Judgment should be granted in the amount of43 hours of overtime. The plaintiff is entitled to judgment in the amount of $649.06.

The court will address the plaintiff's motion for liquidated damages in the discussion of the defendants' Motion for Full Summary Judgment below.

II. Defendants' Motion for Full Summary Judgment.

The defendants filed a Cross Motion for

Summary Judgment on all other issues. Specifically, the following issues are raised:

1) Whether the plaintiff is entitled to any overtime compensation for time worked before 1999.

2) Whether the plaintiff is entitled to any overtime compensation for additional overtime worked in 1999.

3) Whether there are any facts to show that the defendants wilfully withheld overtime compensation and the plaintiff is entitled to liquidated damages.

DISCUSSION

1) Whether the plaintiff is entitled to any overtime compensation for time worked before 1999.

The plaintiff argues that he worked other overtime hours before 1999, although he failed to present specific, probative evidence of the number of hours and when those hours were worked. He contends that, from September29, 1996 until December 1998, he was required to attend monthly safety meetings that lasted approximately 2 1/2 hours. He further contends that he was not paid for those meetings. The plaintiff also argues that he was never paid for his breaks, although he fails to support that contention with any evidence.

The defendants argue that the plaintiff's father, Michael Mulcahey, was the lead man on the crews to which the plaintiff was assigned. Mr. Mulcahey states that he reported to the defendants

each hour that the plaintiff worked.

The plaintiff simply fails to present evidence to support his contention that he is owed overtime compensation for any hours worked before 1999. The plaintiff cannot defeat the defendants' summary judgment motion by making conclusory, non specific statements and presuming that, somehow, missing facts will be presumed. *Lujan,* 497 U.S. at 889. The defendants' motion for summary judgment on this issue should be granted.

2) Whether the Plaintiff is entitled to any overtime compensation for additional overtime worked in 1999.

The plaintiff claims that he is owed additional overtime in 1999, other than what he requested in his motion for partial summary judgment. Specifically, he argues that he should receive additional compensation for time spent at safety meetings, including travel time, for hours worked on January 1, 1999 and July 4, 1999.

The defendants deny that the plaintiff is due any additional compensation. The defendants state that they paid the plaintiff $50.00 for each safety meeting that he attended in 1999, including a free breakfast. They deny that they ever agreed to pay for travel time as the meetings were located at the defendants' primary place of business. The defendants deny that the plaintiff worked on January 1, 1999 and on July 4, 1999.

Although the plaintiff denies the defendants'

statement that they paid him $50.00 for each safety meeting that he attended in 1999, he does not present any evidence to support this allegation. The defendants present the Declaration of Ludvik Stribney (Dkt. #61) and the pay stub for April 1999 to support their contention that they paid the plaintiff the $50.00 per meeting. At best, an issue of fact remains for trial on this issue for the months of January, February, March, May, June, July and August 1999, although it appears that the parties can resolve this issue by an exchange of information. The court strongly hopes that this very limited issue can be resolved without the need for trial.

The plaintiff does not present any evidence to support that the defendants agreed to pay him travel pay for attending the safety meetings, nor does he present any evidence of the distance traveled and the allegedly agreed on basis for payment of travel, for example, based on time or mileage. Again, the plaintiff relies on conclusory non specific statements. As aptly stated in *Anderson,* 477 U.S. at 254, the plaintiff must meet the same substantive evidentiary burden here as he would in trial. Based on the preponderance of the evidence standard, the plaintiff has not presented any evidence to support his claim for travel pay when attending safety meetings. The defendants' motion for summary judgment should be granted on this issue.

Finally, the plaintiff does not state how many

hours he worked on January 1, 1999 or on July 4, 1999, nor does he present any probative evidence that he worked those hours. He presents the Declaration of Tricia Reeves, who is the plaintiff's girlfriend. Dkt. #51. She states that the plaintiff worked on January 1, 1999 and on July 4, 1999 but also does not give any information as to the number of hours. Obviously, any statement by Ms. Reeves on the number of hours would be hearsay unless Ms. Reeves stayed with the plaintiff during the time that he worked or had some other way of obtaining personal knowledge of the number of hours he worked. For the same reasons stated above, the plaintiff does not present any substantive evidence to support his claim that he worked a certain number of hours on these two days and that he was not paid for those hours. The defendants' motion for summary judgment should be granted on this issue.

3) Whether there are an facts to show that the defendants wilfully withheld overtime compensation.

RCW 49.52.070 provides for an award of twice the amount of wages unlawfully withheld if an employer willfully and with intent to deprive an employee of any part of his wages pays an employee lower wages than the employer is obligated to pay the employee. According to the Washington Supreme Court, a non-payment of wages is willful when it is not a matter of mere carelessness but the result of knowing and intentional action. *Chelan*

County Deputy Sheriffs' Assoc. v. County of Chelan, 109 Wash.2d 282, 745 P.2d 1, 11(1987); *see also Brinson v. Linda Rose Joint Venture, 53* F3d 1044, 1050 (9th Cir.1995). An employer does not willfully withhold wages under this statute where he has a bona fide belief that he is not obligated to pay them. *Id.* Where the obligation to pay wages is fairly debatable double damages are not awardable under this statute. *Id.* (internal quotations omitted). Willful also means "that the person knows what he is doing, intends to do what he is doing, and is a free agent." *Schiiing v. Radio Holdings. Inc.,* 136 Wash.2d 152, 160 (1998) (citations and internal quotations omitted). *See also Ebling v. Gove's Cove, Inc.,* 34 Wash.App. 495, 500 (1983) ("Under RCW 49.52.050(2), a non-payment of wages is willful when it is not a matter of mere carelessness, but the result of knowing and intentional action.").

Here, the plaintiff's successful overtime claim is 43 hours in 1999. In order to attempt to prove that the defendants' conduct was wilful, the plaintiff contends that his boss demanded that he falsify his time records. The plaintiff fails to name his "boss," and he fails to specifically show that the defendants wilfully withheld the 43 hours of overtime from him. The plaintiff also presents the Declaration of James Cross (Dkt. #58) to support his allegation that he was required to falsify his time records. However, as pointed out by the defendants in the Reply Declaration of Ludvik Stribney (Dkt. #61),

the accuracy and veracity of Mr. Cross' declaration is quite in doubt. Rather, the record reflects that the unpaid overtime compensation was merely an oversight by the defendants.

The defendants' motion for summary judgment on this issue should be granted.

As to the issue regarding payment of the $50.00 for attending the safety meetings, the court should deny the defendants' motion without prejudice if the defendants cannot show that they paid the plaintiff for attending the safety meetings.

III. Plaintiff's Cross Motion for Summary Judgment on Remaining Issues

The plaintiff filed a cross motion for summary judgment on all remaining issues on June 21, 2000, noted for July 14, 2000. On review of the file and the motion, the court notes that the motion addresses "numerous hours of overtime beyond the 43 hours of unpaid overtime admitted to by the defendants," which "includes 78.75 hours of time that the plaintiff spent in safety meetings held each month." Plaintiff's Motion, p.1 (Dkt. #62). Although the court is aware that the motion is technically not ripe for consideration, both of these issues are addressed herein. The plaintiff does not present any additional argument or evidence in support of his motion. Further briefing will not change the court's ruling. The plaintiff's motion should be denied without prejudice based on the court's discussion herein.

Therefore, it is hereby

ORDERED that Plaintiff's Motion for Partial Summary Judgment (Dkt. #40) is **GRANTED**. The plaintiff is entitled to judgment against the defendants in the amount of $649.02. It is further

ORDERED that Defendants' Cross Motion for Full Summary Judgment on All Issues (Dkt. #45) is **GRANTED IN PART** as to the following issues: overtime compensation for the years of 1996 through 1998, January 1, 1999, and July 4, 1999, attendance at the safety meeting in April 1999, travel time to safety meetings, and wilfulness on the above. The motion is **DENIED IN PART WITHOUT PREJUDICE** as to payment of $50.00 for attendance at safety meetings for the months of January, February, March, May, June, July and August 1999, and the issue of wilfulness. It is further

ORDERED that Plaintiff's Cross Motion for Summary Judgment on Remaining Issues (Dkt. #63) is **DENIED WITHOUT PREJUDICE.**

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 28th day of June, 2000

/s/

ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SEAN M. MULCAHEY,)
Plaintiff,) No. C99-5506RJB
v.)
EURO GEN. CONTRACTORS,) ORDER
a corporation registered under) GRANTING
the laws of the State of) MOTION FOR PARTIAL
Washington, LUDVIK) SUMMARY JUDGMENT
STRIBNEY,)
Defendant.)

This matter comes before the court on Defendants' Motion for Partial Summary Judgment on Statute of Limitations (Dkt. #27) The court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

SUMMARY JUDGMENT STANDARD

The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)

(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T W. Elec. Service Inc. v. Pacific Electrical Contractors Association,* 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial -- e.g., the preponderance of the evidence in most civil cases. *Anderson,* 477 U.S. at *2554; T W. Elec. Service Inc.,* 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T W Elec.* Service, 809 F.2d at 630 (relying on *Anderson, supra).* Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation,* 497 U.S. 871, 888-89 (1990).

FACTUAL BACKGROUND

The plaintiff worked for the defendants from 1992 until August 30, 1999. He is seeking unpaid overtime compensation for the time of his employment pursuant to the Federal Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.* and Washington State law, RCW 49.46. The defendants operate a general contracting business. The defendants deny the plaintiffs claims, and move for partial summary judgment, arguing that a three-year statute of limitations applies to limit the plaintiffs claims to extend back no further than September 29, 1996.

ISSUES

The issue in this motion is whether the three-year statute of limitations in both federal and state law limit the plaintiffs period of recovery.

DISCUSSION

Pursuant to the FLSA, 29 U.S.C. § 255:

> Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, ... (a) if the cause of action accrues on or after May 14, 1947--may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within

three years after the cause of action accrued... Under Washington State law, a three-year statute of limitations also applies. *See SPEEA v. Boeing Co.*, 139 Wash.2d 824 (2000) (holding that "the three-year statute of limitations of RCW 4.16.080(3) applies to WMWA [and unpaid overtime] claims.") (Publication page references are not available for this document.).

The defendants argue that the plaintiff's claims should be limited to the three years before he filed his suit, that is, September 29, 1996.

The plaintiff argues that equitable tolling should be applied because the defendants failed to post the required notice advising employees of their rights under the minimum and overtime provisions of the FLSA. *See* 29 CFR § 516.4. The plaintiff states that he never saw the notice. His girlfriend, Tricia Reeves, states that she never saw the notice when she came to pick up Mr. Mulcahey from work.

The defendants counter the plaintiff's statements that the required notices were openly and conspicuously posted during the entire time that the plaintiff worked for the defendants. Further, the defendants argue that equitable tolling only applies when there is also active misrepresentation by the employer. *See Kamens v. Summit Stainless, Inc.*, 586 F.Supp. 324, 328 (E.D. Pa. 1984).

The court has considered the authorities cited by the parties. The statements of Mr. Mulcahey and Ms. Reeves present evidence that they did not see

the posted notices. These statements do not raise a material issue of fact in the face of positive evidence that the notices were posted. For the reasons stated by the defendants, the motion for partial summary judgment should be granted, and the plaintiff's claims should be limited to those accruing after September 29, 1996.

Therefore, it is hereby

ORDERED that Defendants' Motion for Partial Summary Judgment on Statute of Limitations (Dkt. #27) is **GRANTED.** The plaintiff's claims shall extend back to September 29, 1996 only.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any appearing *pro se* at said party's last known address.

DATED this 8th day of May, 2000

/s/
ROBERT J. BRYAN
United States District Judge